Supreme Court, U.S.
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No. 98-1581

IN THE

Supreme Court of the United States

CHARLES JONES,

Petitioner,

v.

DONALD J. TRUMP, MARLA MAPLES TRUMP, THE PLAZA HOTEL, also known as PLAZA OPERATING PARTNERS, LTD., ROBERT MORGANTHAU, individually and as District Attorney, County of New York, DOREEN KLEIN, individually and as an Assistant District Attorney for the County of New York, THE TRUMP ORGANIZATION, JEANINE PIRRO, District Attorney, individually and as District Attorney, County of Westchester, ALBERT PIRRO, MATTHEW CALAMARI, DOMENIC PEZZO, JANIE ELDER, JOHN BANER, Individually and as a New York City Police Officer, ROBERT GIANETTA, Individually and as a New York City Police Officer, DEL LARROCA, FREDERICK H. COHN, EXECUTIVE PLAZA CONDOMINIUM, CDL HOTELS, MICHAEL BERGER, RICHARD FIELDS, CITY OF NEW YORK, ANN OGLETREE, BRIAN HIGGINS, Individually and as a New York City Police Officer, and WILLIAM LYNCH, Individually and as a New York City Police Officer,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JEANINE PIRRO

ALAN D. SCHEINKMAN
Westchester County Attorney
Attorney for Respondent
Jeanine Pirro, Westchester County
District Attorney
600 Michaelian Office Building
148 Martine Avenue
White Plains, New York 10601
(914) 285-3652

STACEY DOLGIN-KMETZ
Chief Deputy County Attorney

THOMAS G. GARDINER
Sr. Assistant County Attorney
Of Counsel

QUESTION PRESENTED

Does the Order of the United States Court of Appeals for the Second Circuit which affirmed Orders of the United States District Court for the Southern District of New York, which dismissed petitioner Charles Jones' complaints in their entirety and denied leave to amend, raise any issue warranting review by this Honorable Court?

No. The Courts below properly stated the rules of law with regard to: dismissal upon the grounds of Rule 8 of the Federal Rules of Civil Procedure; dismissal upon the grounds of Rule 12(b)(6) of the Federal Rules of Civil Procedure; and denial of leave to amend to a *pro se* litigant. The Courts below also properly applied the foregoing rules of law and made no erroneous factual findings.

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STATEMENT OF THE CASE

By the instant petition Charles Jones seeks a writ of certiorari from this Honorable Court authorizing review of a Summary Order of the United States Court of Appeals for the Second Circuit, entered on September 21, 1998 (A17-19).[1] That Order of the Court of Appeals affirmed Orders of the United States District Court for the Southern District of New York entered on May 22, 1997 (A20-32) and July 11, 1997 (A33-40) dismissing two complaints filed by the petitioner Charles Jones pursuant to Federal Rules of Civil Procedure 8 and 12(b)(6), and denying leave to amend those complaints.

The complaints in the District Court were assigned Docket Numbers 96 Civ. 2995 and 96 Civ. 6927[2]. The allegations set forth in 96 Civ. 2995, for the most part, center upon the arrest of petitioner and searches of his

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[1] Numbers preceded by the letter "A" refer to the respective pages of the Appendix annexed to Charles Jones' Petition for a Writ of Certiorari.

[2] Both of these complaints were in fact "amended" complaints. Docket Number 96 Civ. 2995 was originally filed in United States District Court for the District of Connecticut and was thereafter transferred to United States District Court for the Southern District of New York (A41-47). Upon transfer to the Southern District of New York, the Hon. Shira A. Scheindlin (U.S.D.J.) permitted the petitioner to file and serve an amended complaint as of right. Docket Number 96 Civ. 6927, as originally filed and served, was hand-written and illegible. Petitioner was once again permitted to file and serve an amended complaint.

property in July of 1992, arising out of allegations that he had burglarized the apartment of the respondent Marla Maples Trump located in New York County. Subsequent to the foregoing, petitioner was indicted and convicted in state court and sentenced to a term of incarceration of one and one-half years to four and one-half years.[3] There was no allegation contained in 96 Civ. 2995 that respondent Jeanine Pirro participated, or directed in any manner, the arrest and searches of July of 1992.

The allegations set forth in the complaint filed as 96 Civ. 6927, for the most part, centered upon the arrest of the petitioner in October of 1995 arising, among other things, out of his purported facsimile transmission, to various locations within New York County, of unsolicited messages which included sexually explicit photographs. There were no factual allegations naming the respondent Jeanine Pirro contained within the complaint filed as 96 Civ. 6927, regarding the events of October 5, 1995.

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[3] Petitioner's appeals of this conviction in the courts of New York State proved unavailing, but by Order of the United States District Court for the Southern District of New York (SCHEINDLIN, J.), dated September 19, 1996, plaintiff's *habeas corpus* petition for a new trial was granted. That Order was subsequently affirmed by Order of the United States Court of Appeals for the Second Circuit. See *Jones v. Vacco*, 1996 U.S. Dist. LEXIS 13851 (S.D.N.Y. Sept. 19, 1996) aff'd 126 F.3d 408 (2d Cir. 1997).

However, in January of 1996, the respondent Jeanine Pirro, the District Attorney of Westchester County, received reports that two unsolicited facsimile messages containing prurient, sexually explicit written material, and a photograph of a similar nature had been received by the Mayor of the City of New Rochelle and the General Manager of the Wing Foot Country Club. These facsimile messages were transmitted many months after the transmissions which were the basis of the charges for which the petitioner was arrested in October of 1995 and were received in Westchester County as opposed to New York County. The facsimile messages received in Westchester County in January of 1996 bore the name and business address of the petitioner and one of the two messages made reference to the respondent Donald Trump's negotiations with the City of New Rochelle concerning the development of David's Island, a negotiation in which respondent Donald Trump was represented by the respondent Albert Pirro. In light of the reference to the David's Island negotiation, and because the respondent Albert Pirro is her spouse, respondent Jeanine Pirro, as the District Attorney of Westchester County, disqualified herself and her staff from the investigation of this matter and requested the appointment of a Special District Attorney pursuant to New York State County Law

Section 701(1)(b). By Order dated March 19, 1996, and filed in Supreme Court, Westchester County, the Hon. James M. Catterson, Jr., the District Attorney of Suffolk County, was appointed as Special District Attorney to investigate the transmission of the facsimile messages that were received in Westchester County in January of 1996.

Petitioner acknowledged in his complaints that although he was interviewed during the course of the ensuing investigation undertaken by the Special District Attorney, he was neither arrested nor prosecuted as a result. Nonetheless, by his complaints petitioner alleged the commission of Racketeering Influenced and Corrupt Organizations Act violations by the respondent Jeanine Pirro and further asserted claims against her for false arrest and unlawful imprisonment; the use of excessive force; malicious use of process and retaliatory prosecution; malicious abuse of process; verbal abuse and harassment; illegal search, seizure and violation of the right to privacy; conspiracy; violation of his first amendment right to free speech; and harassment and the intentional infliction of emotional distress.

By motion dated February 28, 1997, respondent Jeanine Pirro moved, *inter alia*, to dismiss both complaints pursuant to Rule 8 and Rule 12(b)(6) of the Federal Rules of Civil Procedure. All of the respondents filed similar

motions. By Opinion and Order dated May 22, 1997, the United States District Court for the Southern District of New York granted all of the respondents' motions to dismiss pursuant to Rule 8 and Rule 12(b)(6) of the Federal Rules of Civil Procedure, and denied petitioner leave to amend his complaints[4] (A20-32). That Order was subsequently modified by Order dated July 11, 1997 in a manner which did not disturb the District Court's earlier determination to grant the motions of all respondents seeking dismissal pursuant to Rule 12(b)(6) and Rule 8, and to deny petitioner leave to amend (*Jones v. Trump*, 971 F.Supp. 783, 789 (S.D.N.Y. 1997) reproduced at A33-40). These Orders of the District Court were affirmed by Order of the Court of Appeals for the Second Circuit, dated September 21, 1998, which noted in pertinent part that:

> For substantially the same reasons expressed in the district court's Opinions and Orders dated May 22, 1997 and July 11, 1997, we affirm the district court's dismissal of Jones's claims. In particular, we find that the district court was correct in holding that Jones's two amended complaints manifestly violated Rule 8 in light of their "needless length and complexity" and inclusion of

[4] It would appear that the District Court addressed only those grounds for dismissal which were common to all defendants inasmuch the additional grounds for dismissal asserted by respondent Jeanine Pirro pursuant to Rule 12 (b)(2) and Rule 12(b)(5) were not considered.

> allegations that are "scandalous, impertinent, immaterial and provocative." .... The district court did not abuse its discretion in refusing to grant Jones leave to amend in light of the resultant prejudice to the defendants and Jones's inability to cure the many legal defects in the complaints.

Jones v. Trump, 1998 U.S. App. LEXIS 23531 at 2 (2d Cir. N.Y. Sept. 21, 1998)(citations omitted) reproduced at A18-19.

By Order dated January 12, 1999, the Court of Appeals for the Second Circuit denied rehearing (A48).

On March 30, 1999, a copy of Charles Jones' Petition for a Writ of Certiorari was delivered by U.S. Mail to the Westchester County Department of Law in an envelope post-marked March 27, 1999.

Charles Jones petition was docketed by the Clerk of the United States Supreme Court on April 1, 1999.

REASONS FOR DENYING THE PETITION

Petitioner Has Failed to Raise an Issue Which Warrants Review by This Honorable Court.

Pursuant to Rule 10 of this Court, review on a writ of certiorari is not a matter of right, but of judicial discretion. The principal purpose for which the United States Supreme Court uses certiorari jurisdiction is to

resolve conflicts among the Circuit Courts of Appeal and state courts concerning the meaning of provisions of federal law. See *Braxton v. U.S.*, 500 U.S. 344, 111 S. Ct. 1854, 114 L.Ed.2d 385 (1991). "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." United States Supreme Court Rule 10.

The Court of Appeals for the Second Circuit and the District Court for the Southern District of New York in the matter at bar both properly stated the rule of law that complaints that are needlessly lengthy and complex, and that contain scandalous, impertinent and immaterial allegations, violate Rule 8 of the Federal Rules of Civil Procedure and that such complaints may properly be dismissed without leave to amend if prejudice would result to a defendant or the defects in the complaint could not be cured (*Jones v. Trump*, 1998 U.S. App. LEXIS 23531 at 2 (2d Cir. N.Y. Sept. 21, 1998) reproduced at A18-19; *Jones v. Trump*, 1997 U.S. Dist Lexis 7324 at 11 (S.D.N.Y. May 22, 1997) reproduced at A30 citing *Salahudin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988) and *Oliver Schools, Inc. v. Foley*, 930 F.2d 248, 253 (2d Cir. 1991). Both the Courts below recognized that *pro se* litigants are not routinely

denied leave to amend[5] complaints to conform with Rule 8 but found that the entry of such an Order herein was appropriate inasmuch as there was no means by which the petitioner could amend his complaints to state a valid cause of action against any of the respondents. In so holding, the Courts below "properly stated [the] rule of law." Moreover, the petitioner herein should be estopped from arguing that this is one of those "rare" instances in which certiorari review should be granted to review "erroneous factual findings or the misapplication of a properly stated rule of law" because he did not include in the appendix to his petition the subject complaints. This failure to supply the pleadings has deprived this Honorable Court of the ability to weigh the merits of the lower courts' findings that the complaints herein manifestly violated Rule 8 and were not susceptible of amendment to state a valid claim. "The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." United States Supreme Court Rule 14(4).

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[5] Notably both of the complaints herein had already been subjected to amendment, albeit prior to the entry of the Orders of dismissal. Statement of the Case at 1 n.2.

However, and notwithstanding the fact that the principal purpose of certiorari review is to resolve conflicts among the Circuit Courts of Appeal and state courts concerning the meaning of provisions of federal law, it is clear from a review of petitioner's complaints[6] that the courts below neither erred upon the facts or misapplied the law in finding that dismissal upon the grounds of Rule 8 and Rule 12(b)(6) of the Federal Rules of Civil Procedure was appropriate and that neither complaint was susceptible of amendment to state a valid cause of action.

RULE 12(b)(6)

96 CIV. 2995

In this complaint, the petitioner stated only one claim against respondent Jeanine Pirro, which is raised in his first cause of action and alleged, in conclusory fashion, violations of the Racketeering Influenced and Corrupt Organizations Act (18 U.S.C. §1962(b),(c),(d)) (96 Civ. 2995 at para. 150-61). The only specific factual averments made in support of this cause of action alleged that respondent Jeanine Pirro, as a participant in an "enterprise," improperly used the Office of District Attorney of Westchester County to request the appointment of a Special

[6] One copy of each of these complaints have been lodged with the Clerk of this Honorable Court by the Respondent herein and

District Attorney to investigate the transmission of two facsimile messages, purportedly sent by the petitioner, containing prurient, sexually explicit written material as well as photographs of a similar nature (96 Civ. 2995 at 140-45).

Notwithstanding the utter lack of merit of petitioner's underlying allegations of bad faith in the request for the appointment of a Special District Attorney, petitioner's first cause of action also failed to state a claim pursuant to the Racketeering Influenced and Corrupt Organizations Act ("RICO") upon its face. The United States Court of Appeals for the Second Circuit has set forth the following as the criteria that must be satisfied to establish any violation of 18 U.S.C. §1962:

> (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or participates in (6) an "enterprise" (7) the activities of which affect interstate commerce or foreign commerce.

DeFalco v. Dirie, 923 F.Supp. 473, 476 (S.D.N.Y. 1996) citing *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983) cert. denied sub. nom. *Moss v. Newman*, 465 U.S. 1025, 104 S. Ct. 1280, 79 L.Ed.2d 684 (1984).

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are available for review.

Moreover, in order to have standing a civil RICO plaintiff must show: "(1) a violation of 1962; (2) injury to business or property; and (3) causation of the injury by the violation." Id. quoting *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23 (2d Cir. 1990).

Judged against the foregoing criteria, the inadequacies of petitioner's RICO claim as against respondent Jeanine Pirro were clear. Although petitioner herein alleged the commission of extortion, mail fraud, wire fraud,[7] obstruction of justice and tampering with witnesses, as the acts of the respondents upon which his RICO claim is predicated, he failed to indicate which respondents committed, or aided or abetted in the commission of which predicate acts. Therefore, his complaint fails to state a claim. *Morin v. Trupin*, 747 F.Supp. 1051, 1064-65 (S.D.N.Y. 1990). Indeed, insofar as respondent Jeanine Pirro is concerned, a review of the 149 paragraphs preceding petitioner's RICO cause of action, fails to reveal any factual allegations that respondent Jeanine Pirro committed any predicate act, much less two predicate acts, the sole averment being that respondent Jeanine Pirro abused the Office of District Attorney in requesting the appointment of a Special District Attorney.

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[7] Plaintiff's allegations that respondent Jeanine Pirro committed wire fraud were not pled with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure.

See *Mathon v. Marine Midland Bank, N.A.*, 875 F.Supp. 986, 995 (E.D.N.Y. 1995)(predicate acts must be crimes under state or federal law). Petitioner's utter failure to plead respondent Jeanine Pirro's commission of any predicate act, standing alone, justified the determination of the District Court to dismiss this cause of action, founded upon purported violations of 18 U.S.C. §1962(b),(c),(d).

Similarly, petitioner's summary allegation that all of the acts of the various respondents were the result of "common, continuing schemes against plaintiff originating on or about 1991" (96 Civ. 2995 at para. 20) also fails to satisfy general RICO pleading requirements. Therefore, the determination of the District Court to dismiss was correct since it is well settled that in order to avoid dismissal for failure to state a claim, a RICO plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an "enterprise." *Comwest, Inc. v. American Operator Services, Inc.*, 765 F.Supp. 1467, 1475 (C.D. Cal. 1991) quoting *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989). Petitioner further failed to plead the necessary pattern of activity and causation required to sustain a RICO claim. In order to prove a pattern, a plaintiff must "show that the racketeering predicates are

related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989)(emphasis in original). Petitioner's complaint was devoid of such allegations. Also, in order to sustain a civil RICO claim, a plaintiff must allege injury to his business or property caused by a defendant's predicate acts. *Burdick v. American Express Co.*, 865 F.2d 527, 529 (2d Cir. 1989) *citing* 18 U.S.C. §1964(c). As petitioner's complaint is devoid of any such allegations of injury to his business or property against respondent Jeanine Pirro, it fails to state a claim as against her.

Notwithstanding these general pleading deficiencies which apply to any RICO action, petitioner's allegations against respondent Jeanine Pirro also failed to state claims pursuant to individual subdivisions "b", "c" or "d" of Section 1962. Petitioner's conclusory allegations failed to establish even the existence of an enterprise and therefore any allegation that respondent Jeanine Pirro had acquired an interest or exercised control over any such enterprise failed to state a claim pursuant Section 1962(b). Insofar as subdivision "c" of Section 1962 was concerned, the focus of that subdivision is upon the "individual patterns of racketeering engaged in by a defendant, rather than the

collective activities of the members of the enterprise." *United States v. Persici*, 832 F.2d 705, 714 (2d Cir. 1987) cert. denied sub nom *Russo v. United States*, 486 U.S. 1022, 108 S. Ct. 1995, 100 L.Ed.2d 227 (1988). Accordingly, in failing to plead with specificity which respondents committed which predicate acts, petitioner's §1962(c) allegation fails to state a claim. Finally, to the extent that a conspiracy pursuant to 18 U.S.C. §1962(d) was claimed to exist, the complaint was deficient in failing to allege that respondent Jeanine Pirro "by word[ ] or action[ ], manifested an agreement to commit two or more predicate acts in furtherance of the common purpose of the RICO enterprise." *Com-Tech Associates v. Computer Associates International, Inc.*, 753 F.Supp. 1078 1092 (E.D.N.Y. 1990) quoting *First City National Bank and Trust Company v. Federal Deposit Insurance Corporation*, 730 F.Supp. 501, 509 (E.D.N.Y. 1990). In order to sustain a claim under this subdivision, a plaintiff is required to allege that defendants committed two or more predicate acts or personally agreed to commit two or more predicate acts. See *United States v. Rastelli*, 870 F.2d 822, 832 (2d Cir. 1989). Conclusory allegations of participation in a §1962(d) conspiracy "will not avail on a motion to dismiss, and the plaintiff must plead allegations that each defendant knowingly agreed to participate in the conspiracy ... ."

Com-Tech Associates at 1092 citing *Grunwald v. Bornfreund*, 668 F.Supp. 128, 133 (E.D.N.Y. 1987).

For the foregoing reasons, petitioner's RICO claims, insofar as they relate to the respondent Jeanine Pirro were properly dismissed in their entirety for failure to state claim for which relief can be granted.

96 CIV. 6927

In this complaint, petitioner asserted claims against respondent Jeanine Pirro in his first, second and sixth causes of action.

Petitioner's first cause of action in this complaint alleged various violations of his civil rights, punishable pursuant to 42 U.S.C. §1983, committed by respondent Jeanine Pirro and various other the respondents arising out of petitioner's arrest on October 5, 1995 (96 Civ. 6927 at para. 69-132). In order to state a valid claim pursuant to 42 U.S.C. §1983 a plaintiff must allege the personal involvement of a defendant in the purported constitutional deprivation. Pivotally, all of the acts underlying this cause of action were allegedly committed outside the jurisdiction of respondent Jeanine Pirro as District Attorney of Westchester County by persons not under her direction and control. The petitioner failed to allege any personal involvement of the respondent Jeanine Pirro in the

constitutional deprivations purportedly visited upon petitioner on or about October 5, 1995, and therefore this cause of action was properly dismissed by the District Court pursuant to controlling precedent. *Moffitt v. Town of Brookfield*, 950 F.2d 880, 886 (2d Cir. 1991); *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977) cert. denied 434 U.S. 1087, 98 S. Ct. 1282, 55 L.Ed2d 792 (1978).

Petitioner's second cause of action alleged a violation of his first amendment right to free speech by respondent Jeanine Pirro and various other respondents punishable pursuant to 42 U.S.C. §1983 (96 Civ. 6927 at para. 133-38). The conduct of respondent Jeanine Pirro pled in support of this cause of action was her request for the appointment of a Special District Attorney to investigate and possibly prosecute the transmission of two facsimile messages, purportedly sent by the petitioner, containing prurient, sexually explicit written material as well as photographs of a similar nature[8] (96 Civ. 6927 at para 52-57). It was unnecessary to reach the constitutional

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[8] Respondent Jeanine Pirro disqualified herself and her staff from the investigation of this matter and requested the appointment of a Special District Attorney pursuant to New York State County Law §701(1)(b) because one of the subject facsimile messages made reference to the respondent Donald Trump's negotiations with the City of New Rochelle concerning the development of David's Island, a negotiation in which the respondent Donald Trump was represented by the respondent Albert Pirro, the spouse of respondent Jeanine Pirro.

issue posited by petitioner because respondent Jeanine Pirro's request was based upon a reasonable interpretation of New York State Penal Law (Penal Law) §240.30, which provides in pertinent part that:

> A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she:
>
> 1. Communicates, or causes a communication to be initiated by mechanical or electronic means or otherwise, with a person, anonymously or otherwise, by telephone, or by telegraph, mail or any other form of written communication, in a manner likely to cause annoyance or alarm ... .

New York Penal Law §240.30(1).

Regardless of whether or not the content of these facsimile messages would be protected pursuant to the first amendment in another context, the narrow question herein was whether or not the transmission of these facsimile messages was undertaken with the intent to "harass, annoy, threaten or alarm" recipients who had not requested this material. The actions of state prosecutors in initiating and pursuing criminal prosecutions are entitled to absolute immunity and the "discretionary" activities of such prosecutors are subject to qualified immunity under 42 U.S.C. §1983 when "their conduct does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268-69, 113 S. Ct. 2606, ____, 125 L.Ed.2d 209, ___(1993) quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, ___, 73 L.Ed.2d 396, ___ (1982). Accordingly, the action of respondent Jeanine Pirro in requesting the appointment of a Special District Attorney to investigate whether Penal Law §240.30(1) had been violated by the transmission of the described facsimile messages to unwitting recipients was entitled to, at least, qualified immunity. Cf. *Mozzochi v. Borden*, 959 F.2d 1174 (2d Cir. 1992) (initiation of prosecution under Connecticut statute proscribing communications made "in a manner likely to cause annoyance or alarm" did not violate a clearly established right). In any event, the petitioner offered no cogent explanation of how the exercise of his first amendment rights were violated or "chilled" by the respondent Jeanine Pirro when: (1) no prior restraint was placed upon his exercise of his right to free speech; (2) the respondent Jeanine Pirro merely requested and secured the appointment of a Special District Attorney to investigate the already accomplished transmission of two facsimile messages; (3) investigators under the direction of that Special District Attorney, not respondent Jeanine Pirro,

interviewed the plaintiff in a non-custodial setting; and (4) no criminal action was commenced.

Plaintiff, in his sixth cause of action in this complaint, invoked the pendent jurisdiction of the federal courts and alleged the commission of the state law torts of harassment and the intentional infliction of emotional distress (96 Civ. 6927 at para. 117-24). Inasmuch as there is no cognizable tort of "harassment" pursuant to New York common law, the District Court properly treated this cause of action as one solely for the intentional infliction of emotional distress (A32 at n.5) and dismissed it. The elements of the tort of the intentional infliction of emotional distress are:

> 1) conduct that goes beyond "all possible bounds of decency;" 2) the intention to cause distress, or knowledge that defendant's conduct would result in emotional distress; 3) severe emotional distress; and 4) a casual link between the defendant's conduct and plaintiff's distress.

Gay v. Carlson, 60 F.3d 83, 89 (2d Cir. 1995).

Petitioner utterly failed to meet these elements in the sole factual allegation raised against respondent Jeanine Pirro that, as District Attorney of Westchester County, she requested the appointment of a Special District Attorney to investigate the transmission of two facsimile messages

containing prurient, sexually explicit written material as well as photographs of a similar nature. *Roberts v. Pollack*, 92 A.D.2d 440, 448, 461 N.Y.S.2d 272, 277 (1st Dep't 1988)("series of acts necessary to establish a viable action [for the intentional infliction of emotional distress]"). In so acting, respondent Jeanine Pirro was seeking to diligently enforce the criminal laws of the State of New York while avoiding even the appearance of impropriety and therefore conducted herself in a manner which did not violate any clearly established right of the plaintiff. See *Buckley v. Fitzsimmons*, 509 U.S. 259, 268-69, 113 S. Ct. 2606, ____, 125 L.Ed.2d 209, ___(1993) quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, ___, 73 L.Ed.2d 396, ___ (1982).

In summary, the single cause of action asserted against respondent Jeanine Pirro in the complaint filed as 96 Civ. 2995, and the three causes of action asserted against respondent Jeanine Pirro in the complaint filed as 96 Civ. 6927, failed to state claims for which relief can be granted and were properly dismissed, as against respondent Jeanine Pirro, by the District Court pursuant to Rule 12(b)(6).

RULE 8

The District Court properly ordered that the claims asserted against the respondent Jeanine Pirro contained in the complaints filed as 96 Civ. 6927 and 96 Civ. 2995 be dismissed in their entirety pursuant to Rule 8 of the Federal Rules of Civil Procedure because those complaints were "needless[ly] length[y] and complex[ ] [and] contained allegations that [were] scandalous, impertinent, immaterial and provocative" (A29).

Pursuant to Rule 8, pleadings are to contain a "short and plain statement of the claim showing that the pleader is entitled to relief" (Rule 8(a))(2)) and "[e]ach averment of a pleading shall be simple, concise and direct" (Rule 8(e)(1)). Plaintiff's violations of these pleading rules throughout the two complaints which total "125 pages setting forth a combined total of 54 independent claims against 25 defendants" (A21) are manifest and abundant. See, e.g. 96 Civ. 2995 at para. 21(i)(d); 22(iv)-(vii); 91(ii); 140; 148 and 96 Civ. 6927 at para 7(i); 8(iii); 28-32; 66. In light of the foregoing and due to the confusion engendered by plaintiff's barely intelligible complaint and despite the "less stringent standards" to which the pleadings of pro se litigant's are held (*Hughes v. Rowe*, 449 U.S. 5, 10, 101 S.Ct. 173, ___, 66 L.Ed.2d 163, ___ (1980)(per curiam) quoting *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct.

2893, ___, 106 L.Ed.2d 195, ___ (1972)), the District Court appropriately dismissed these pro se complaints pursuant to Rule 8. Accord *Prezzi v. Schelter*, 469 F.2d 691 (2d Cir. 1972)(dismissing 88 page pro se complaint for failure to meet Rule 8 requirements); *Gillibeau v. City of Richmond*, 417 F.2d 426, 431 (9th Cir. 1969)(dismissal pursuant to Rule 8 is usually reserved for those cases in which the "complaint is so 'verbose, confused and redundant that its true substance, if any, is well disguised'").

DENIAL OF LEAVE TO AMEND

Insofar as respondent Jeanine Pirro is concerned, the District Court did not abuse its discretion in denying petitioner leave to file amended complaints in the actions commenced as 96 Civ. 6927 and 96 Civ. 2995 because there was no possibility that a valid claim could be asserted therein against respondent Jeanine Pirro.

Although the decision as to whether or not to grant leave to amend a complaint is within the discretion of the District Court, refusal to grant leave must be based upon a valid ground. *Ronzani v. Sanofi S.A.*, 899 F.2d 195, 198 (2d Cir. 1990). Moreover, while it is generally an abuse of discretion to deny leave to amend a nonfrivolous complaint dismissed solely upon the grounds of Rule 8 (*Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988), the denial of leave

to amend the instant complaints, following their dismissal upon other Rule 12(b)(6) grounds as well as Rule 8, is distinguishable.

One valid ground to deny leave to amend a complaint is when the granting of such leave would be futile. *Acito v. Imcera Group, Inc.*, 47 F.3d 47, 55 (2d Cir. 1995) citing *S.S. Silberblatt, Inc. v. East Harlem Pilot*, 608 F.2d 28, 42 (2d Cir. 1979). At least insofar as the respondent Jeanine Pirro was concerned, it would have been futile to permit the filing of amended complaints inasmuch as there is no scenario by which the petitioner could have stated valid claims against respondent Jeanine Pirro.

Insofar as the RICO claim asserted against respondent Jeanine Pirro filed in 96 Civ. 2995 was concerned, assuming *arguendo* that petitioner could plead sufficient facts to establish the existence of an "enterprise," there is no state of facts by which respondent Jeanine Pirro could be demonstrated to be a participant in such an enterprise. Participation in an enterprise is demonstrated by the commission of two predicate acts. See, e.g. *DeFalco v. Dirie*, 923 F.Supp. 473, 476 (S.D.N.Y. 1996) citing *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983) cert. denied sub. nom. *Moss v. Newman*, 465 U.S. 1025, 104 S. Ct. 1280, 79 L.Ed.2d 684 (1984). The only act of the

respondent Jeanine Pirro, alleged to have been committed as a participant in the enterprise, was her request for the appointment of a Special District Attorney, which was undertaken based upon a reasonable interpretation of New York State Penal Law §240.30(1). If leave to amend his complaints had been granted, petitioner would have been unable to state a valid RICO claim against respondent Jeanine Pirro inasmuch as it is alleged that only one, not the required two acts, were committed by respondent Jeanine Pirro as a participant in the purported enterprise. Moreover, not even this single act could serve as a predicate because it was not a crime (*Mathon v. Marine Midland Bank, N.A.*, 875 F.Supp. 986, 995 (E.D.N.Y. 1995)(predicate acts must be crimes under state or federal law)) and did not violate a "clearly established statutory or constitutional right[ ] of which a reasonable person would have known" (*Buckley v. Fitzsimmons*, 509 U.S. 259, 268-269, 113 S. Ct. 2606, ____, 125 L.Ed.2d 209, ___ (1993) quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, ___, 73 L.Ed.2d 396, ___ (1982)).

Any attempt to amend the causes of action asserted against respondent Jeanine Pirro in 96 Civ. 6927 would have been equally futile. Petitioner's 42 U.S.C. §1983 cause of action arising out of the events of October 5, 1995 failed to allege the personal involvement of respondent

Jeanine Pirro and therefore failed to state a cause of action as against her. See *Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir. 1991); *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977) cert. denied 434 U.S. 1087, 98 S. Ct. 1282, 55 L.Ed2d 792 (1978). Petitioner's second cause of action was also asserted pursuant to 42 U.S.C. §1983 and alleged a violation of his first amendment rights. This cause of action was also not susceptible of amendment to state a valid cause of action against respondent Jeanine Pirro because the purported first amendment violation by respondent Jeanine Pirro arose out of her request for the appointment of a Special District Attorney to investigate petitioner's possible violation of New York State Penal Law §240.30(1). This request was made in respondent Jeanine Pirro's official capacity as District Attorney of Westchester County, was based upon a reasonable interpretation of a penal statute, did not violate a "clearly established statutory or constitutional right[ ] of which a reasonable person would have known" (*Buckley v. Fitzsimmons*, 509 U.S. 259, 268-269, 113 S. Ct. 2606, ____, 125 L.Ed.2d 209, ___(1993) quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, ___, 73 L.Ed.2d 396, ___ (1982) and was therefore entitled to, at least, qualified if not absolute immunity. The final cause of action asserted against respondent Jeanine Pirro in 96 Civ.

6927 was likewise not susceptible to amendment. In that cause of action petitioner invoked the pendent jurisdiction of the federal courts and alleged the commission of the state law torts of harassment and the intentional infliction of emotional distress. New York State law does not recognize the tort of harassment and insofar as petitioner's claim of the intentional infliction of emotional distress is concerned, the petitioner can not amend this cause of action in a manner that will state a claim inasmuch as, among other things, respondent Jeanine Pirro's request for a Special District Attorney was based upon a reasonable interpretation of New York State Penal Law and therefore was clearly not conduct that goes "beyond all possible bounds of decency." See *Gay v. Carlson*, 60 F.3d 83, 89 (2d Cir. 1995).

In conclusion, certiorari review by this Honorable Court is not warranted herein because the courts below properly stated and applied the applicable rules of law and made no erroneous findings of fact.

CONCLUSION

Based upon the foregoing, respondent Jeanine Pirro, the Westchester County District Attorney, respectfully requests that the Petition for a Writ of Certiorari filed by Charles Jones be denied in its entirety and that this Honorable Court grant such other and further relief as is deemed just and proper.

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White Plains, New York

Respectfully submitted,

ALAN D. SCHEINKMAN
Westchester County Attorney
Attorney for Respondent
Jeanine Pirro
Westchester County
District Attorney
600 Michaelian Office Building
148 Martine Avenue
White Plains, New York 10601

STACEY DOLGIN-KMETZ
Chief Deputy County Attorney

THOMAS G. GARDINER
Sr. Assistant County Attorney
Of Counsel